

LAW OFFICE

200406

McLEOD, WATKINSON & MILLER

MICHAEL R. McLEOD
WAYNE R. WATKINSON
MARC E. MILLER
RICHARD T. ROSSIER
CHARLES A. SPITULNIK
RICHARD PASCO
PAUL D. SMOLINSKY

ONE MASSACHUSETTS AVENUE, N.W.
SUITE 800
WASHINGTON, DC 20001-1401
(202) 842-2345
TELECOPY (202) 408-7763

KATHRYN A. KLEIMAN
OF COUNSEL
(*Admitted in Virginia only)

ROBERT RANDALL GREEN
LAURA L. PHELPS
GOVERNMENT RELATIONS

STEPHEN FRERICHS
ECONOMIST

November 17, 2000

RECEIVED
NOV 17 2000
MANAGEMENT
STB

Honorable Vernon A. Williams
Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 582
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of the Secretary

NOV 17 2000

Part of
Public Record

Re: *Major Rail Consolidation Procedures*
Ex Parte 582 (Sub-No. 1)

Dear Sir:

I am enclosing an original and twenty-five (25) copies of the Comments of the New York City Economic Development Corporation in the above-referenced proceeding. An additional copy is enclosed for date-stamp and return to our messenger. Please note that a copy of this filing is also enclosed on a 3.5 inch diskette in WordPerfect format.

Sincerely,

Charles A. Spitulnik

Charles A. Spitulnik

Enclosure

cc: Julia M. Farr, Esquire
Surface Transportation Board

200 406

ENTERED
Office of the Secretary

NOV 17 2000

Part of
Public Record

Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423



Ex Parte 582 (Sub-No.1)

MAJOR RAIL CONSOLIDATION PROCEDURES

**COMMENTS OF
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION**

I. INTRODUCTION

The New York City Economic Development Corporation ("NYCEDC"), on behalf of the City of New York, hereby submits these comments in response to the Notice of Proposed Rulemaking served in this proceeding on October 3, 2000 (the "NPRM"). NYCEDC recognizes the improvement the proposed rules represent in the Board's willingness to protect the interests of the public, and is cautiously optimistic that these proposed rules may be an acknowledgment by this Board that it has and will use the authority and the tools to require railroads to take the steps necessary to ensure that future mergers do not bring benefits to the carriers at the expense of shippers, other businesses and residents in the cities affected by the transaction.

NYCEDC is a local development corporation created by the City of New York to promote economic growth and create business opportunities through a variety of financial incentives and assistance programs. This role includes the preservation and enhancement of the City's rail freight and maritime transportation infrastructure that serves the five boroughs and the metropolitan region. With that mission, it has a direct concern for the regulatory framework that governs the nation's freight railroads. NYCEDC is participating in this proceeding to review the proposed rules with an eye towards ensuring that the Surface Transportation Board ("STB") uses

the full range of its authority under its enabling legislation to guard the public interest, including preservation of a level competitive playing field and preventing adverse impacts on safety and the environment. NYCEDC's specific comments on the proposed rules follow.

II. SPECIFIC COMMENTS

A. The Board is properly recognizing that its analysis of the competitive impacts of the transaction must look beyond the borders of the U.S. to assess the transnational impacts of the merger. The rail networks of the U.S., Canada and Mexico are increasingly integrated. The Canadian National Railway Company no longer stretches just across Canada with minimal incursions into the U.S. Its recent merger with the Illinois Central Railroad Company and its marketing alliance with the Kansas City Southern Railway extend its reach throughout the Midwest and to the Gulf of Mexico. The Canadian Pacific system reaches deep into the U.S. Midwest as well, and serves New York and the other Mid-Atlantic States over the routes of the former Delaware & Hudson. The implementation of the North American Free Trade Agreement ("NAFTA") has expanded the interest of all of the U.S. railroads in marketing and operating arrangements that move traffic across both the northern and southern borders.

One example of an issue of great interest to cities or regions like the New York City metropolitan area and that may well be implicated in future merger transactions is the competition between or among ports both within the U.S. and in Canada and Mexico. Actions of merging carriers that will advantage ports in Canada, for example, have the potential for creating a disadvantage to a U.S. port. The Board states specifically that the revised merger rules are not designed to protect against the impacts of increased competition, *see* proposed §1180.1(d), *NPRM* at 16. At the same time, though, the Board clearly is, as it should be, interested in identifying and addressing impacts that will affect the availability of the national transportation

infrastructure for use by U.S. commercial and defense interests. The Board can not regulate transportation that occurs beyond the borders of the U.S., but it clearly is appropriate for it to assess the impact of actions or strategies beyond those borders on the interests of the public within the U.S. The Board's specific recognition of the need to address "full system" competitive analyses in transactions involving major Canadian or Mexican railroads (proposed §1180.1(k), *NPRM* at 21) is both a necessary and appropriate exercise of this Board's authority.

B. As the number of rail transportation alternatives shrinks due to the continuing mergers among rail carriers, it is appropriate and within the Board's authority for the Board to require applicants to propose actions that will enhance competition in the context of a proposed merger. *See* Proposed §§1180.1(d), 1180.(b)(10), *NPRM* at 16, 30. The experience of the City of New York in the recent CSX – NS – Conrail transaction¹ demonstrates the importance of remaining vigilant in this regard.

The applicants' proposal in that proceeding to create the Shared Assets Area in northern New Jersey effected a fundamental change in the railroad competitive environment in the New York metropolitan region. Whereas before that transaction, all shippers suffered equally at the hands of Conrail, which had a near-lock on rail service in this market, the arrangement the applicants there proposed brought a completely different competitive picture to the region after the transaction. Shippers in one segment of the market - - Northern New Jersey - - would have two Class I rail carriers available on their doorstep. Shippers across the Hudson and across New York Harbor would not. They would have only one Class I railroad in their back yards, with access to the other only via a circuitous route via Albany, or via intermodal shipment across

¹ F. D. No. 33388, *CSX Corporation, et al. - - Control and Operating Leases/Agreements - - Conrail Inc., et al., slip op.*, Service Date July 23, 1998

highways and bridges that were already congested to a choke point. The Board correctly agreed to remedy this situation, approving the proposal submitted by NYCEDC and New York State to permit a second Class I carrier to have access to the east side of the Hudson via trackage rights over a line to be acquired by CSX in that transaction. *See* F. D. No. 33388 (Sub-No. 69), *Responsive Application - - State of New York, By and Through Its Department of Transportation, and The New York City Economic Development Corporation*.

This is the type of remedy that the proposed new regulations will encourage applicants to craft on their own, working together with interests who, like the public agencies and commercial interests on the east-of-the-Hudson corridor, see a problem and a solution that does not unduly disadvantage the applicants.

C. The Board is correct in recognizing the need for making the oversight process it has used in recent cases part of its standard operating procedure. Proposed Section 1180.1(g), *NPRM at 19*. No amount of planning and projection by experts of the changes that will occur and the impacts, both positive and negative, of those changes, will be able to predict with certainty the fallout from future mergers. The Board's retention of oversight jurisdiction in recent cases has acknowledged that reality, requiring carriers to report regularly on developments with respect to the effectiveness of conditions imposed and with respect to fallout in general from the implementation of the merger.

As important, though, as the Board's oversight jurisdiction, is its willingness to use aggressively and affirmatively the authority it restates in the proposed rule to "impose any additional conditions it deems are necessary to remedy or offset unforeseen adverse consequences of the underlying transaction." *Id.* The Board's ability to fully utilize this authority depends both on the merging carriers' to be accurate in their reporting, and on affected

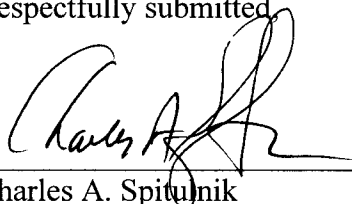
parties to state reasonably and accurately the impacts they are experiencing and to seek reasonable and appropriate relief to address those impacts. For the Board to play a meaningful role, it will need to put the merging parties to the test of responding fully and accurately to issues, whether related to competition, harms to the environment, or impacts on local commuter operations, raised during the course of this oversight or in petitions for immediate relief that parties may file. It is essential here that the Board use its authority to investigate fully any claims for post-merger relief and to respond pro-actively, not simply leaving the merged carriers and the claimant to work out a private solution and not taking at face value the carriers' assertion that all is well. Codifying current practice in this rule puts the merging parties on notice that they might well be required to expend additional resources after the original conditions have been satisfied in order to continue reaping the benefits of the transactions they bring forward. The imposition of these additional conditions in the future may well, it is true, change the calculus of the risks and benefits of implementing the transaction, but that is part of the risk and of the cost of doing business in the rail industry. This is an appropriate and necessary exercise of the Board's authority and mandate to protect the public interest.

III. CONCLUSION

The proposed changes to the merger rules represent an effort by the STB to address the evolving competitive environment in the rail industry, and to anticipate issues that will arise almost certainly in any future merger application. NYCEDC appreciates the Board's efforts to enhance its array of tools to assess the benefits and adverse impacts of these mergers. The proof of the effectiveness of the tools the Board has described, though, will come as the mergers are presented, approved and implemented. These proposed rules, if the Board uses its authority aggressively, have the potential to provide safeguards for the public and private interests that will

be at risk as a result of the proposals that are sure to come. NYCEDC, recognizing the breadth as well as the limits of the STB's power, supports this recognition of the need for increased scrutiny of potential transactions and the Board's use of the full panoply of remedies that are available to it under the broad authority granted by Congress.

Respectfully submitted,



Charles A. Spitulnik
McLeod, Watkinson & Miller
One Massachusetts Avenue, N.W.
Suite 800
Washington, D.C. 20001
(202) 842-2345
Counsel for the New York City Economic
Development Corporation

Dated: November 17, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 2000, a copy of the Comments of the New York City Economic Development Corporation was served by first class mail, postage pre-paid upon all Parties of Record.

Charles A. Spitulnik
Charles A. Spitulnik